Supreme Court, U.S.
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DOCKET NO. 00 - 877

In The

Supreme Court Of The United States

STEPHEN BURNS KESSLER,
Petitioner,

KEPSFILMS, INC.,
Plaintiff,

vs.

MICHAEL CRICHTON, ANNE MARIE MARTIN,
STEVEN SPIELBERG,
AMBLIN' ENTERTAINMENT, INC.,
WARNER BRO., INC. &
UNIVERSAL STUDIOS, INC.,
Respondents.

On Petition From An Appeal To The Eighth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN BURNS KESSLER
Petitioner
639 West Rose Hill
Kirkwood, Missouri 63122
314-966-0214

Petitioner, Pro Se

21pp

SUPPLEMENTAL QUESTIONS FOR REVIEW

1. IS IT DENIAL OF FIFTH AMENDMENT DUE PROCESS FOR A COURT TO ISSUE JUDGMENT ON A MOTION PENDING BEFORE IT WITHOUT ALLOWING PROPER OPPOSITION ARGUMENT?

2. IF LOWER COURT ORDERS EXPRESS DOUBT ABOUT THE MEANING OF THE LAW AND THE APPELLATE COURT UPHOLDS THE LOWER COURT JUDGMENT WITHOUT QUESTION, HAS THE APPELLATE COURT UPHELD DOUBT ABOUT THE MEANING OF THE LAW?

3. WHEN COURTS EXPRESS DOUBT ABOUT THE MEANING OF THE LAW AND THE CONSTITUTIONAL QUESTION IS CALLED BY A PARTY BEFORE THE COURT, IS THE APPELLATE COURT MINISTERIALLY OBLIGATED UNDER FEDERAL RULE OF APPELLATE PROCEDURE, RULE 44 TO NOTIFY THE EXISTENCE OF SAID QUESTIONS TO THE ATTORNEY GENERAL OF THE UNITED STATES?

4. PRIOR TO ISSUANCE OF FINAL JUDGMENT SHOULD THE COURT FIRST RULE ON A TIMELY SUBMITTED CERTIFICATION OF CONSTITUTIONAL QUESTIONS STILL PENDING BEFORE IT?

5. IS IT UNCONSTITUTIONAL FOR THE APPELLATE COURT TO ISSUE FINAL MANDATE AS RATIONALE TO RENDER MOOT A TIMELY SUBMITTED MOTION FOR CERTIFICATION OF CONSTITUTIONAL QUESTIONS?

6. IS SAID ACTION ON THE PART OF THE COURT ESSENTIALLY AN UNCONSTITUTIONAL FORM OF PRIOR RESTRAINT UNDER THE FIRST AMENDMENT AS IT RENDERS MOOT THE CONSTITUTIONAL QUESTIONS SINCE FINAL JUDGMENT WAS CONSIDERED ISSUED?

7. IF THE COURT FAILS TO CERTIFY QUESTIONS ALLOWING CONFUSION OF LAW TO STAND DOES THE COURT'S ACTION PREJUDICE FUTURE LITIGANTS IN SIMILAR ACTIONS?

8. IF DIRECT APPEAL TO THE SUPREME COURT IS UNAVAILABLE ON DECISIONS FROM A COURT OF APPEALS THAT CONSTITUTIONALLY INVALIDATES AN ACT OF CONGRESS - IS THE REPEAL OF TITLE 28 U.S.C. § 1252 UNCONSTITUTIONAL UNDER ARTICLE I AND ARTICLE III BY ENABLING VIOLATIONS IN THE FIRST AND FIFTH AMENDMENT TO STAND UNOPPOSED CONTRARY TO THE TENNETS OF THE CONSTITUTION OF THE UNITED STATES?

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1. **The District Court denied due process to Petitioner by disallowing proper opposition argument from Petitioner over respondents November 9, 2000 Motion To Enforce Court Order.** 4

   A. **The Court instead ruled for respondents' motion on November 13, 2000, technically the day after receiving said motion. Federal Rule Of Civil Procedure, Rule 6(a), allows 8 days excluding holidays and weekends for Petitioner to respond to said motion.** 4

   B. **The District Court usurped its power by denying due process right to respond by Petitioner.** 4

2. **The respondents' motion cites the Appellate Court denial of Stay of Mandate and Petitioner's Certification of Constitutional Questions as modality for their argument that "all matters were resolved."** 5

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3. **The disallowed opposition argument asserts the Appellate Court's earlier judgments rendering moot certification procedure usurped discretion by denying Certification of Constitutional Questions to the Attorney General of the United States contrary to its statutory mandate pursuant to Fed. R. App. P. 44 and Title 28 U.S.C. 2403(a).** 5

4. **The Appellate Court's failure to uphold its mandate pursuant to Title 28 U.S.C. § 2403(a) and Fed. R. App. P. 44 to certify the constitutional questions allows a live controversy to exist in this case. Simply stated, if every Court upheld doubt about the meaning of the law as modality for its judgments, then its judgments and the law itself would have no meaning whatsoever. That violates constitutional law.** 9

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SUPPLEMENTAL BRIEF TO PETITION

Stephen Burns Kessler respectfully submits a Supplemental Brief in support of the Petition For Writ of Certiorari. Petitioner requests that the Supreme Court of the United States review the judgments of the Eighth Circuit Court of Appeals with respect to judgments by the United States District Court made after Petition For Certiorari #00 - 877 was put before this Honorable and Esteemed Court.

OPINIONS BELOW

The final judgment of the Eighth Circuit Court Of Appeals is unreported and printed in App. 1 of Petition For A Writ Of Certiorari. The opinions of the Eighth Circuit Court of Appeals are unreported are printed in Appendices 4, 5, 6 of Petition For A Writ Of Certiorari. Judgments of the District Court are found in Appendices 7, 17, 21 and 22. of Petition For A Writ Of Certiorari. The District Court's ruled document of November 13, 2000 is in App. 1, herein.

JURISDICTION

Jurisdictional statement can be found on page 1 of Petition For A Writ Of Certiorari. This supplement to the Petition For A Writ Of Certiorari arises out of the District Court judgment of November 13, 2000, currently under appeal to the Eighth Circuit Court of Appeals under Fed. R. Civ. P. 60(b)(4) through Notice of Appeal, November 27, 2000.

Supreme Court Rule 29.4(b) Requirement: Pursuant to directives in 28 U.S.C. § 2403(a) petitioner calls to question the constitutionality of the Acts Of Congress, 17 U.S.C. § 501, (jurisdiction under "The Copyright Act"), through rulings by courts defined by 28 U.S.C. § 451 with citation that 28 U.S.C. § 2403(a) may apply with service of this petition to the Solicitor General of the United States. The Appellate Court refused to perform its ministerial obligation to certify existence of said questions pursuant to Fed. R. App. P. 44, an act deserving proper judicial review.

CONSTITUTIONAL PROVISIONS STATUTES & REGULATIONS

Constitution Of The United States of America: **Article I** separation of powers; and **Article III**, power invested in the judiciary.

The First Amendment: "Congress shall make no law...abridging the freedom of speech...and the right to petition the Government for redress of grievances." **The Fourth Amendment:** "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." **The Fifth Amendment:** "nor shall any person be subject to the same offense to be twice put in jeopardy"; "nor be deprived of life, liberty, or property without due process of law."

Title: 17 U.S.C. § 501, jurisdiction "Copyright Act," stating in part: Only the holder of the copyright has authority to bring forth suit.

Federal Rules of Appellate Procedure, Rule 44, Cases Involving Constitutional stating: the court is obligated by law to certify existence of Constitutional questions to the Attorney General Of The United States.

SUPPLEMENTAL STATEMENT OF THE CASE

On June 17, 1997, the District Court issued a Protective Order with respect to return of confidential discovery documents in this case. On August 11, 2000 the Eighth Circuit Court of Appeals issued mandate in this case rendering Petitioner's constitutional questions as moot. Pet. App. 5, 6. On October 24, 2000, petitioner filed Petition For A Writ of Certiorari to the Supreme Court Of The United States, docketed # 00 – 877 on November 29, 2000. On November 9, 2000, respondents filed a Motion To Enforce Court Order of June 17, 2000 to the District Court demanding return of all confidential discovery documents in this case. On the second day of receipt of said motion, the Court entered judgment in favor of respondents' without allowing proper opposition argument to be put forth by Petitioner. *See* App. 1, herein. On November 27, 2000, Petitioner filed an appeal from the District Court's order to the Eighth Circuit Court of Appeals pursuant to Fed. R. Civ. P., Rule 60(b)(4) due to usurpation of power. On December 13, 2000, respondents waived right to respond to Petition for Writ Of Certiorari in the Supreme Court of the United States enabling, after ten days, a ruling by the Supreme

Court on the Petition before it prior to its consideration of actions pending in the current appeal. Further, on December 19, 2000 respondents' filed a separate law suit in the District Court, case # 4:00CV02011ERW demanding all of Petitioner's copyrighted works to sell off to pay the $35,973 constitutionally questionable judgment. This case is before the same judge who denied due process to Petitioner.

REASONS FOR SUPPLEMENT TO PETITION

Supplemental Brief is appropriate as the recent judgments by the United States District Court for the Eastern District of Missouri, Eastern Division has so far departed from the accepted and usual course of judicial proceedings and said departure was enabled through constitutionally questionable rulings by the Eighth Circuit Court Of Appeals that it calls for exercise of the Supreme Court's supervisory powers.

1. The District Court denied due process to Petitioner by disallowing proper opposition argument from Petitioner over respondents November 9, 2000 Motion To Enforce Court Order.

A. The Court instead ruled for respondents' motion on November 13, 2000, technically the day after receiving said motion. Federal Rule Of Civil Procedure, Rule 6(a), allows 8 days excluding holidays and weekends for Petitioner to respond to said motion.

B. The District Court usurped its power by denying due process right to respond by Petitioner.

This post-Petition action by the District Court indicates the lack of "rights consciousness" exhibited by the Court throughout this case. The due process right to be treated fairly and be given an opportunity to properly argue against government action is fundamental to the rule of law. *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Goss v. Lopez*, 419 U.S. U.S. 565, (1975). In *Grannis v. Ordean*, 234 U.S. 385, (1914), the Court held, "The fundamental requisite of due process of law is the opportunity to be heard." The central aim of due process is to assure fair procedure when the government imposes a burden on an individual. The burden on Petitioner through respondents' motion was the return of all "hard fought" confidential discovery documents in this case to respondents prior to the Supreme Court's ruling on Petition For A Writ Of Certiorari currently before it. As with its ruling denying Petitioner's post-trial affidavit, the District Court again denied the fundamental right to be heard.

2. The respondents' motion cites the Appellate Court denial of Stay of Mandate and Petitioner's Certification of Constitutional Questions as modality for their argument that "all matters were resolved."

3. The disallowed opposition argument asserts the Appellate Court's earlier judgments rendering moot certification procedure usurped discretion by denying Certification of Constitutional Questions to the Attorney General of the United States contrary to its statutory mandate pursuant to Fed. R. App. P. 44 and Title 28 U.S.C. 2403(a). *See* Pet. App. 5 & 6. For Constitutional Questions *See*: Petition Questions for Review, # 1, 2, 4 – 8.

Certification procedure is founded upon "the District Court's own doubt" about the jurisdictional meaning of Title 17 U.S.C. § 501, jurisdiction under "the Copyright Act":

> "While the Court agrees that section 501 (b) does provide that only the copyright holder has the right to bring a copyright infringement action, the Court is also aware that section 501 does not indicate when a Court will or will not have jurisdiction. Similarly, Section 501 does not indicate when a party who brings a copyright action, but is later found not to be the copyright holder after much discovery in a case, should be liable for costs. Therefore, it is clear that section 501 does not provide all the answers raised by Plaintiff Kessler's repeated attacks upon the costs taxed against him. ... Therefore, the Court must look elsewhere determining whether it had jurisdiction over Plaintiff Kessler." [From District Court Order, March 16, 1999.][1] *See*: Petition App.9, ¶ 3, 10, ¶ 4.

The Supreme Court holds the standing doctrine has an explicitly "prudential" dimension, developed to keep Article III courts from deciding questions more suitable for decisions by politically accountable decision makers.

In this case the prudential dimension of standing was set aside by the Court stating: "Therefore, the Court must look elsewhere determining whether it had jurisdiction over Plaintiff Kessler." See: Pet. App. 9 ¶ 4. This position was

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[1] The Honorable E. Richard Webber, Judge Presiding for the Eighth District Court.

upheld by the Appellate Court's final judgment; a position that endowed the Eighth Circuit Courts as super-legislators over an Act Of Congress, the Copyright Act; *See* Petition App. 1; an adjudication without merit as it is a clear usurpation of power by the courts.

Article I section 2 of the Constitution defines categories of federal jurisdiction in terms of cases and controversies. This led the Supreme Court to hold that federal courts may take jurisdiction only of "justicable" disputes, those "appropriate for judicial determination." *Aetna Life Insurance v. Haworth*, 300 U.S. 227 478 (1937). The Supreme Court continued to affirm under Article I Separation Of Powers that only Congress had power to confirm standing, not the courts. The Eighth Circuit Courts set aside this affirmation as irrelevant to its judgment.

The Eighth Circuit Courts use of *Carlson v. Hyundai* 164 F.3d 1160, 1163 (8th Cir. 1999) to uphold sua sponte in personam joinder of petitioner who was dismissed at trial, infracts the Fourth and Fifth Amendment, copyright stare decisis, and violates the political questions doctrine as the court assumed power to rewrite the statutory limitations of jurisdiction under copyright law imposed by Congress. The lower court's action upheld by the appellate court, violates Article III reference to cases and controversies standing doctrine and were perpetrated due to doubt about the meaning of Title 17 U.S.C. § 501.

In constitutional cases, the Supreme Court identified two aspects of the standing doctrine: "injury-in-fact" and a showing of actual governmental causation of that injury.

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). Said "injury" is undisputedly present in this case and upheld by the Appellate Court which allowed confusion of the meaning of the law to support its judgment; a doubt of law that denied rights under the First, Fourth and Fifth Amendments. Failure to certify the questions will lead to further due process irregularities for future litigants in a copyright case as these questions of constitutionality might escape judicial review if the action were dismissed or rendered moot as the Appellate Court has done in this case.

The questions for certification form a structural integration of standing, separation of powers, and Preferred Freedoms Doctrine which all stem from actions by the Eighth Circuit Courts. The Aschwander Rules and Footnote Four uphold this argument. *Aschwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)

By first denying stay of mandate, the Appellate court denied presentation of relevant facts and the compulsory process of the production of evidence that proved Constitutional Questions are clearly evident in this case. *See*: Petition, App. 5 and 6.

There is no expressed constitutional power in federal courts to implement judgments that rewrite jurisdictional stipulations established by an Act of Congress. If the court expresses doubt about the meaning of the law, then the Court of Appeals is empowered, indeed obligated, to overrule itself when it is persuaded that a particular precedent wrongly construes the Constitution. In this case

the persuasive argument is the District Court's rulings citing doubt about the law; doubt upheld at the Appellate level.

In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the Court ruled on the constitutionality of legislation not because it had a general commission to oversee Congress's legislative behavior, but because the Constitution is law.

However, in this instant case, the Appellate Court exercised prior restraint contrary to the First Amendment by first denying stay, and then rendered certification as moot. *Near v. Minnesota*, 283 U.S. 697 (1931). Its actions equates to denial of free speech protected under the First Amendment

The Court's prior judgment improperly denying certification of constitutional questions was the modality of respondents' argument in the Motion To Enforce Court Order, which asserts, "the Appellate Court resolved all matters in this case." Respondents' argument is unsupported by law.

4. The Appellate Court's failure to uphold its mandate pursuant to Title 28 U.S.C. § 2403(a) and Fed. R. App. P. 44 to certify the constitutional questions allows a live controversy to exist in this case. Simply stated, if every Court upheld doubt about the meaning of the law as modality for its judgments, then its judgments and the law itself would have no meaning whatsoever. That violates constitutional law.

CONCLUSION

The Supreme Court could exercise its power of judicial review and certify the Constitutional Questions to the Attorney General. *See* Petition Questions For Review, # 1, 2, 4 – 8.

Or the Supreme Court, prior to ruling on the Petition For A Writ Of Certiorari #00-877, could allow proper opposition argument to be made in the appeal currently pending before the Eighth Circuit Court of Appeals from the District Court's order of November 13, 2000.

Due to a live controversy present in the current appeal, Certification of Constitutional Questions are no longer moot, facilitating the Appellate Court to uphold its mandate to certify Constitutional Questions to the Attorney General of the United States pursuant to Title 28 U.S.C. § 2403(a). Certification would contribute to arguments made in the Petition For A Writ Of Certiorari currently before the Supreme Court Of The United States and would enable exercise of the High Court's power of judicial review to conform the Act of Congress, Title 101 U.S.C. § 501 "The Copyright Act" to constitutional constraints; thereby protecting future litigants in a copyright action.

Respectfully Submitted,

STEPHEN BURNS KESSLER
Petitioner
639 West Rose Hill
Kirkwood, Missouri 63122
314-966-0214

Petitioner, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

In Re: KEPSFILMS, INC.: Petitioner

Petition For Review To Honorable Justices of The United States Supreme Court

To the Honorable Justices of the Supreme Court of the United States. Petitioner KEPSFilms, Inc.:

¶ 1. Stephen Burns Kessler is an officer of your Petitioner, KEPSFilms, Inc. (a Missouri Corporation in good standing). Missouri law does not allow a corporate officer to represent their corporation in legal proceedings Clark v. Austin, 101 S.W.2d at 982-83. Missouri law does allow an officer of a corporation to petition for review as it "does not arise to the level of active representation or the holding out of the corporate employee to the public as capable of performing legal acts." *See* Liberty Mutual Insurance Co. v. Iones, 344 Mo. 932, 130 S.W.2d 945 (banc 1939); Hulse v. Criger, 247 S.W.2d at 862.

¶ 2. On December 20, 2000, a "Supplement to Petition For Writ Of Certiorari" was filed before the Supreme Court, by petitioner Stephen Burns Kessler in the above referenced case number under his name as sole petitioner without title reference to your petitioner, KEPSFilms, Inc.

THEREFORE, Petitioner KEPSFilms, Inc. petitions the Supreme Court to review Stephen Burns Kessler's pleadings and arguments in a light favorable to Petitioners legal standing as a rightful petitioner in the above action.

Respectfully Submitted,
Stephen Burns Kessler,
Officer for Plaintiff, KEPSFilms, Inc.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
CASE NO. 4:96CV01125 ERW

FILED: NOVEMBER 9, 2000.
RULED DOCUMENT: GRANTED, NOVEMBER 13, 2000
/S/ E. RICHARD WEBBER

STEPHEN B. KESSLER,
Plaintiff - Appellant

v.

MICHAEL CRICHTON, ANNE-MARIE MARTIN AMBLIN' ENTERTAINMENT, INC., STEVEN SPIELBERG, WARNER BROS. INC., UNIVERSAL CITY STUDIOS, INC. CONSTANT C PRODUCTIONS, INC.
Defendant-Appellees

MOTION TO ENFORCE COURT ORDER

Comes now Defendants, and move this Court to make and enter its order requiring Plaintiff to return all confidential materials produced by Defendants during the course of this litigation to counsel for Plaintiff, and in support thereof state:

1. On June 17, 1997, this Court entered a protective order in this case, which required that at the conclusion of this litigation, materials produced by one side to the other marked "Confidential" be returned to the producing party.

2. This case was tried to conclusion in January 1998. Thereafter, Plaintiff appealed the judgment to the United States Court Of Appeals for the Eighth Circuit, which appeal was unsuccessful.

3. At the conclusion of the first appeal, counsel for the Defendants sought return of confidential materials.

4. Attorney Martin Green, formerly counsel to Plaintiff, was completely cooperative in this efforts but was instructed by Plaintiff to withhold the documents until further appeals were exhausted, and so advised counsel for Defendants.

5. Recently, a second appeal to the Eighth Circuit Court of Appeals was denied, and on August 4, 2000, Plaintiff's petition for Rehearing *En Banc* was denied.

6. After the denial of the second appeal, the undersigned again wrote to Mr. Green, requesting the return of confidential documents. Mr. Green responded immediately by seeking the return of confidential documents from Mr. Kessler and Mr. Kessler's counsel, Mark G. Schulte. Unfortunately Mr. Kessler again instructed Mr. Green to refrain from forwarding the required documents.

7. On August 30, 2000 the Court of Appeals for the Eighth Circuit resolved all of the matters raised by Mr. Kessler's letter, by issuing an order stating that the mandate had in fact been issued, and denying Mr. Kessler's motion for certification of constitutional questions.

8. After the action of the Court of Appeals, Mr. Green and the firm of Green, Schaaf and Jacobson were completely cooperative, and along with Mr. Schulte returned some of the confidential materials to counsel for defendants, and certified that they had retained none. However, other confidential materials are in the hands of the Plaintiff

himself, and Plaintiff has refused to acknowledge his duty to return them.

WHEREFORE, Defendants pray this Court make and enter its order requiring that Plaintiff, and all his agents and associates, turn over all materials made available to them during the preparation and trial of this matter, and for its reasonable costs and fees expended herein.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

/s/ Stephen Rovak

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Attorneys for Defendants Michael Crichton, Anne-Marie Martin, Ambin Entertainment, Inc. Steven Spielberg, Warner Bros., Universal City Studios, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Stephen Burns Kessler, 639 West Rose Hill, Kirkwood, Missouri 63122, by U.S. Mail, postage prepaid, on this 8th day of November, 2000.

/s/Stephen Rovak